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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 167.

THE STEAMSHIP "ADULA," &c.,

vs.

THE UNITED STATES.

REPLY BRIEF.

EVERETT P. WHEELER,
Of Counsel for Appellant.

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IN THE

Supreme Court of the United States.

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REPLY BRIEF.

STATEMENT.

The argument for the captors is based upon three propositions:

1. That there was a technical violation by the *Adula* of the law of blockade, which justified the court below in decreeing her forfeiture.

2. That there was an actual intent on her part to run a blockade lawfully established, and that the charter and instructions were fraudulent.

3. That by the charter to Solis she became enemy's property, so as to justify her seizure.

We reply:

1. The *Adula* violated no law.

2. She was guilty of no fraud.

3. She never became enemy's property.

FIRST.

The Adula Violated No Law.

1. Guantanamo bay (or Caimanera, as the village on the shore is called) was not blockaded. It was in the full and undisturbed possession of the United States forces and used by them as a coaling station. Neutral vessels could therefore lawfully go there in the absence of express prohibition from the President. The President had the right, as a war measure, to blockade ports occupied by the Spanish forces. But he never undertook to blockade ports occupied by our own (see Principal Brief, p. 64) or to prohibit intercourse with our Cuban friends.

The captors fail to discriminate between entrance to the bay, which was controlled by our forces, and the landing and passing through our lines. The former was lawful to neutrals without express consent. For the latter, doubtless the consent of the naval and military authorities was required. It might be given or withheld; but to ask it was no crime and incurred no forfeiture.

The mere congregating of vessels in a port, more especially

when that port belongs to a friendly island only partly occupied by foreign forces, does not in itself constitute a blockade. There must also be an intent to institute it, and if there was one here we must suppose that Admiral Sampson objected to having merchant vessels call at Guantanamo. As appears from the captors' brief, as well as the appendix to the brief of the appellant, there were several ships in the harbor, and since June 15th the shores were in the undisturbed possession of the United States marines, the Spaniards having been expelled from that part of the country by an inland expedition.

It is admitted that the President, when the ships were ordered to Guantanamo, said nothing about blockade, but directed the movement for the sake of establishing a port in which the vessels could be coaled, repaired, and equipped.

Such being the state of facts, can any one doubt that it would be advantageous that merchant vessels should have free access to the port? Ships knowing of the existence of such a station might bring and offer supplies for sale, and this might be of great assistance to the Government. It would certainly have been bad policy to establish a hard and fast rule of law that coming within speaking distance of such a station should in itself be a breach of blockade.

On the other hand, it will hardly be seriously contended that the United States could be hurt by the approach of such a vessel as the *Adula*. Captain McCalla could not think it possible that she should get past his fleet, and if she did there were no enemies on the shore. The United States marines were in possession.

We therefore maintain that it was the policy of the

United States to let merchant vessels have free access to their coaling and repairing station.

But if the Government thought otherwise, some notice of that fact should have been given. Notice of a blockade does not mean notice that vessels are in the neighborhood of a port, but that they are there for the purpose of preventing access to it. When vessels might reasonably think that access was not denied, proclamation must be made to make the blockade effective.

Lieutenant Anderson's statement that there was a blockade is only his conclusion. The facts he gives show occupation. It may be Admiral Sampson June 8, 1898, ordered a blockade (p. 149). That was before our troops had obtained possession of the upper bay and shore, and before the President's proclamation of June 27, which defined the limits of blockade.

2. Under the facts of the war with Spain, the Cubans were friends. They were declared by act of Congress "free and independent." The war was not with them, but with the Spanish forces. Of these forces, even in Santiago, General Linares said (Principal Brief, p. 76): "They have no ideals, because they defend the property of people who have deserted them, and of those who are the allies of the American forces."

Therefore communication with the Cubans was lawful, subject to the right of the President to prohibit it temporarily as a war measure.

3. The captors argue that the town of Guantanamo was blockaded; but the *Adula* was not bound for the town. That was inland. She could not sail to it (p. 17). She was

bound solely for Guantanamo bay. As to the town itself, it was a Cuban town. The Spanish forces had been defeated and driven away by United States troops, united with Cuban troops (Principal Brief, pp. 65–67).

4. The President's proclamation, issued only two days before the capture of the *Adula*, is the best possible proof that the Executive never intended to prohibit neutral vessels from entering Guantanamo bay. The statement that other ports were blockaded and the omission to mention this is in effect a declaration that it remained open to neutrals. No intermediate emergency had arisen authorizing a naval officer to make a proclamation for himself. It would be most dangerous to allow a naval officer to seize and forfeit neutral vessels for approaching a port which immediately before the President had considered and omitted from his blockade proclamation. This the naval commander had no power to do.

2 Halleck Int. Law, 184, and authorities cited.

Cases cited, Principal Brief, p. 15.

Captors' argument as to notice of the blockade is really based on the erroneous assumption that Guantanamo was within the limits of blockade stated in the proclamation. Lieutenant Anderson supposed it was (p. 161), and Solis was so informed on board the *Adula* (p. 108), probably by Anderson. But the fact is the reverse.

5. The only authority cited by the captors to show that Guantanamo was a blockaded port is The Circassian, 2 Wall., 135. That case, as Wharton points out, volume 3,

International Digest, § 359, is doubtful law, being in conflict with a previous decision of this court (Thirty Hogsheads *vs.* Boyle, 9 Cranch, 191), and with a subsequent decision of an international tribunal under the treaty of Washington; yet even this case admits the proposition maintained by claimant. It was decided on the fact that the blockaded port was not really in the possession of the United States. The west bank was still held by the Confederates and the city was hostile. It also held that this question of fact was there conclusively determined by the proclamation of the President declaring New Orleans blockaded and a proclamation made after the capture opening the port from a specified date. It distinguished the case from that of a *de facto* blockade, which is the most that is claimed for Guantanamo.

6. So far as Santiago is concerned, how could neutrals know, except by inquiry, the nature of the blockade? The proclamation was silent. To use the language of Lord STOWELL in the *Juffrow Maria Schroeder*, 3 C. Rob., 147, 154:

"A blockade may be more or less rigorous, either for the single purpose of watching the military operations of the enemy and preventing the egress of their fleet, as at Cadiz, or on a more extended scale, to cut off all access of neutral vessels to that interdicted place, which is strictly and properly a blockade, for the other is in truth no blockade, as far as neutrals are concerned."

So Hall on International Law, 4th ed., p. 719.

The natural inference from the failure to specify Santiago was that the blockade there was of the former character.

Foreign ships had been allowed to anchor off the entrance and take off refugees (Principal Brief, p. 77). How illegal, then, was the seizure of the *Adula* for approaching Guantanamo to ask leave to go to Santiago.

It must always be borne in mind that the probability when the *Adula* sailed was that Santiago would soon be bombarded; that this was the place from which refugees would probably most desire at once to escape; that whatever journeying from place to place was to be done by the *Adula* would be under the supervision of the United States naval commanders (Record, p. 27, parag. *c*). It was therefore proper to send her first to Guantanamo bay, which was in possession of the United States, and there ask leave to go farther, and such were her instructions (p. 186).

7. The pass from the Spanish consul was obviously desirable to enable Solis, after obtaining permission from the United States, to open communication with the Spanish authorities within whose lines the refugees would probably be.

SECOND.

There Was No Fraud.

1. The presumptions are against fraud; none is proved.
   The Pegou, note to the Charming Betsey, 9 Cranch, 98
   2 Pistoye & Duverdy des Prises, 51.

2. The previous conduct of the *Adula* raises no presumption of fraud. On the contrary, it reinforces the presumption of honest intent. Twice she had been expressly employed by the United States Government; once she went

into Cienfuegos, which she had a right to do, as the blockade had been raised. The blockading vessels had sailed away to join the squadron arrayed against Cervera.

Record, pp. 26, 27, parag. *b*.

On every occasion she had gone for and brought away refugees, and only refugees. Once she landed some provisions, intended for passengers, to feed the starving people of Cienfuegos, our friends. This was meritorious. She had carried mails for the United States Navy and brought intelligence to our ships.

The newspaper report that she had brought off General Blanco's private secretary is unsupported by proof. It probably originated with some scurvy reporter who had been denied some favor he sought from the Atlas line. In any case it is unproven and untrue.

So far from the owners of the *Adula* having (as captors claim) desired "to engage in enterprises just as close as possible to the line of illegality," they kept as far as possible from it. They relied on the declaration of the United States made at the beginning of the war. They took their ship from her regular employment, and chartered her for objects to promote which the war was declared.

3. The previous conduct of Solis raises no presumption of fraud. He had been engaged in trade with the insurgents in the eastern provinces of Cuba, outside the "trocha" (Record, p. 29, parag. *j*). This also was meritorious. It aided the friends of the United States. There is not the slightest proof that he had ever attempted to enter a blockaded port.

4. The facts of the case establish innocence.

a. There was no concealment. The papers were shown the American consul and he was notified of the voyage.

b. The Atlas Company had no motive for fraud. By the terms of the charter it was to be paid at the same rate whether the *Adula* was permitted to enter the ports or not (Record, p. 11).

c. The *Adula* was not armed and could not force an entrance.

d. She was a slow boat, having a speed of only eight knots, and could not escape from our swift vessels.

e. The force at Santiago and Guantanamo was so overwhelming that the endeavor to elude it would have been an absurdity.

f. She approached this force in broad daylight, anchored, and whistled for a pilot.

g. She had no cargo. Her surplus of about sixty-six tons of coal was no more than enough to provide against emergencies and serve for ballast. A steamer that goes to sea without some margin of coal supply is unseaworthy.

h. Stress is laid on the alleged discrepancy between the *Adula's* position on the chart as it would have been by dead reckoning and as it was. The answer is that claimant offered to prove that this difference was caused by winds on the starboard side (the ship being high out of water) and by the westerly current (Record, p. 27, parag. c). Every prudent navigator allows for such conditions.

i. Stress is laid on the alleged sailing towards Santiago and then going towards Guantanamo. The answer to this is that claimant offered to prove that the captain sailed towards Santiago so as to ask leave from the commanding officer of the squadron to enter Guantanamo. He was in full sight, but no vessel came towards him. It was towards evening, and if he went further towards Santiago it would be too late for him to enter the bay of Guantanamo that night. The coast was rocky and not lighted, and the anchorage outside dangerous (Record, p. 27, parag. *d*).

j. In short, the allegations of fraud are disposed of by the fact that claimant offered proof which would explain every alleged circumstance of suspicion (Record, pp. 25–29). The court held the facts which were offered in evidence irrelevant (Record, p. 50). The decree can therefore be supported only on the ground that there was ground for forfeiture irrespective of intent.

k. It is especially unfair to lay stress on the depositions of Anderson, Ellenberg, and Gill, taken *de bene esse*. Claimant was denied the opportunity to offer evidence in rebuttal or explanation.

THIRD.

Enemy's Property.

Under a charter like the present (as shown at pages 40, 41 of the Principal Brief), Solis had no special ownership in the vessel. He had only a right to use her for a certain purpose, to wit, to bring away refugees, which was not a hostile, but a lawful and friendly purpose.

a. If he were an enemy the United States had a right to prevent this. Even if he were a friend they probably had the right and certainly the power. Solis and the owner both recognized this right. To exercise it required a simple negative; but it does not follow that the property of the neutral should be forfeited.

b. But Solis was not an enemy. He was a Cuban. Claimant offered to show that before the war broke out Solis owed allegiance to Spain, but that when it broke out he left the island of Cuba, "and had taken no part in hostilities against the United States, nor been in any particular an enemy of the same; but, on the contrary, had done all in his power while he remained in Cuba to befriend and assist citizens of the United States who were still in Cuba, and that he cast in his lot with the natives of Cuba, and was desirous that a stable government should be established in said island under the auspices of the United States" (Record, p. 28, parag. *h*).

FOURTH.

The captors having objected to the introduction of evidence on these points and obtained its exclusion, the case ought not to be sent back for proofs, but decided on the offer as a conceded state of facts. Captain Yeats is dead, the other witnesses are scattered, and the actual facts cannot now be proved as they could have been in July, 1898.

EVERETT P. WHEELER,
Of Counsel for Appellant.

SUPPLEMENTARY.

FIFTH.

Passport to Solis.

The cases cited by captors as to the effect of the acceptance by Solis of a passport from the Spanish consul have no application. Solis was not an American citizen. These cases are based avowedly on the rule that a citizen of one belligerent State must not during war trade with the enemy, because that tends to give the enemy aid and comfort.

See the cases themselves, and also—

1 Duer on Ins., 583, § 27 and note.

The Goede Hoop, Edw. Adm., 327.

This case contains an account of the licenses granted by the British during the war with Napoleon, and shows a practical relaxation of the rule as contended for here. One of these is printed in full in—

Everth *vs.* Tunno, 1 B. & Ald., 142.

In that case a license to trade was obtained both from the English and the French. This, as Duer points out in the note before cited, made the voyage lawful, even as between subjects of the belligerents. Such license from both was what Solis undertook to get and what the Atlas Company stipulated for; otherwise it was expressly agreed the ship should return to Kingston.

In short, the fallacy underlying the captors' briefs is that trade or intercourse between a neutral and a belligerent is unlawful. In fact, it is lawful, except where restricted by the law of blockade.

EVERETT P. WHEELER,
Of Counsel for Appellant.

No. 628. 167

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

The Steamship "ADULA," etc., The ATLAS STEAMSHIP COMPANY, Claimant, etc.,
Appellant,
vs.
THE UNITED STATES.

No. 628.

The appellant concurs with the Solicitor-General in the motion to advance this cause and the other prize causes on the docket and assign them for early hearing. But the appellant submits that they should not be assigned for a hearing before the October Term, 1899. The Record in No. 628 in not yet printed. It is voluminous, and will require the preparation of a careful and well-considered brief, and the engagements of counsel are such that the necessary preparation cannot conveniently be made in time for an argument before May 15th.

Under these circumstances the appellant submits that it will be for the general convenience of all parties interested, and their counsel, that the causes should be assigned for hearing at an early day in October, 1899.

EVERETT P. WHEELER,
Counsel for Appellant.